In the High Court of Judicature for Rajasthan
At
Jaipur Bench, Jaipur

J U D G M E N T

In

S.B. Criminal Appeal No.678/2005
Pintu @ Hem Raj and another
Vs.
State of Rajasthan

Date Of Judgment :: 10.10.2007

Hon'ble Mr. Justice Jitendra Ray Goyal

Mr. Biri Singh Sinsinwar |
Mr. Anil Upman |
Mr. M.P. Khandelwal | for accused appellants.
Mr. S.N. Gupta, Public Prosecutor for State.

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By the Court

This appeal under section 374 of the Code of Criminal Procedure has been preferred against the judgment and order dated 22/7/2005 passed by the Special Judge, NDPS Act Cases (Sessions Judge) Jhunjhunu in Sessions Case No.83/1996 whereby accused appellants have been convicted for the offence under section 8/20 of the NDPS Act, 1985 and sentenced to undergo ten years' rigorous imprisonment and fine of Rs.1,00,000/- each, and in default of payment of fine,

to further undergo one year's imprisonment.

2. In short, the prosecution case is that on 1/1/1996 Shri Brij Mohan, SHO, Police Station Gudha (Jhunjhunu) received a secret information that two persons were sitting at Balaji stand with 'Ganja' and were in the try to sell it; acting on the information Sh. Brij Mohan, SHO, proceeded with the police party to Balaji stand where two persons as described by the informer were found; on looking the police party they tried to flee but they were caught by the police party; on asking their names, one person was identified as Pintu and another one was Vishnu Kant; Pintu was having a red coloured suitcase in his right hand likewise Vishnu Kant was having a gray coloured suitcase; on suspicion that they were having 'Ganja', they were given option for search before some gazetted officer but both the persons had given their consent for search by the SHO himself. On search in the presence of 'motbir' witnesses, it was found that both the persons were having 'Ganja' in their respective suitcases. The contraband 'Ganja' was weighed and from the possession of the appellant Pintu 3 kg. & 100 gm 'Ganja' was recovered likewise 4 kg. & 300 gm. 'Ganja' was recovered from the possession of the appellant Vishnu Kant; samples were taken out and sealed packets were prepared. Since accused persons were not

having any license for possession of 'Ganja' they were arrested. The samples were sent for chemical examination to the Forensic Science Laboratory. After investigation charge-sheet for the offence under section 8/20 of the NDPS Act was filed.

3. After filing of the charge-sheet, in turn the case came up for trial in the court of Special Judge, NDPS Act Cases (Sessions Judge), Jhunjhunu. After hearing the parties charge under section 8/20 of the NDPS Act was framed and read over to the accused appellants, who denied the same and claimed trial. In support of prosecution case ten witnesses were examined. Statements of accused appellants under section 313 of the Code of Criminal Procedure were recorded, they claimed innocence. No evidence was led in defence.

4. After hearing both the parties, the trial court convicted and sentenced the accused appellants as mentioned above.

5. I have heard learned counsel for accused appellants and learned Public Prosecutor for the State and perused the impugned judgment and have gone through the material available on the record of the trial court.

6. It was inter alia contended that prosecution failed to establish beyond reasonable doubt that samples of 'Ganja' sent to the Forensic Science Laboratory were the same which were drawn at the time of search. Advancing this arguments, it was submitted that according to the FSL report Ex.P10 both the samples marked as A1 and B1 were packed in Polithin while no such fact that the samples were packed in Polithin finds place in recovery memo Ex.P3 prepared at the spot. In support of this contention reliance was placed on **Sitab Khan @ Mangu and another Vs. State of Rajasthan**, reported in **2007(1)WLC (Raj.) page 736**.

7. Per contra, learned Public Prosecutor contended that cited judgment is distinguishable in view of the facts and the evidence produced in the present case. The prosecution has successfully proved by cogent evidence on the point of recovery of 'Ganja' from the accused persons, taking out and sealed the samples of 'Ganja' at the spot, deposition of the said sealed samples in the 'malkhana of the Police Station Gudha, keeping them in the sealed condition till both the samples were sent for chemical examination on 30/1/1996 through PW7, Constable Om Prakash and the contents

regarding seals were found intact condition while they were received by the Forensic Science Laboratory.

8. I have considered the aforesaid submissions in the light of the material evidence available on the record.

9. No doubt, these facts have not been mentioned in the recovery memo Ex.P3 that both the samples were packed first in Polithin but merely this omission is not sufficient at all to disbelieve the entire prosecution evidence. The learned trial Judge has considered this fact in detail in para 32 of his judgment and came to this conclusion and rightly so that both the samples were kept intact from the period of putting the seal impression on the spot till both the samples were delivered in the laboratory for examination. PW6 Shri Brij Mohan, SHO, was examined twice before the trial court. He was cross-examined in detail on the point of recovery of 'Ganja' from the accused persons, taken out the samples, putting seals on the samples on the spot and preservation of samples in 'malkhana' till the samples were handed over in the laboratory and nothing adverse has came out in cross-examination. No such question was put to him regarding discrepancy of the packing the samples in polithin. Further the

oral testimony of PW6 Brij Mohan finds support from PW 9 Shreechand, the then Head Constable and in-charge of the malkhana at Police Station Gudha and PW7, constable Om Prakash who received both the samples from 'malkhana' and delivered the same in the laboratory at Jaipur. From the contents of the FSL report Ex.P10, it is clear that both the samples were found within separate white cloth covers, which were properly sealed bearing impression and tallied with seal impression forwarded with the samples.

10. In view of the entire discussion made here-in-above, the said contention of learned counsel for the appellants cannot be accepted.

11. It was next contended that alleged offence pertains to the year 1996 i.e. before the amendment of 2001 in the NDPS Act of 1985 and at the time of commission of the offence the maximum punishment for the similar offence under section 20(b)(i) of the NDPS Act of 1985 was rigorous imprisonment for a term which may extend to five years and fine which may extend to rupees fifty thousand but the trial court imposed the imprisonment for a period of ten years which is contrary to the law in view of the Article 20 of the

Constitution of India and section 41 of the Amending Act of 2001.

12. Learned Public Prosecutor did not seriously controvert the above legal submission.

13. I have pondered over this submission.

14. There is no doubt that alleged offence pertains to 1/1/1996 much prior to the amendment made in the NDPS Act of 1985 by the amendment Act 9 of 2001. It is also not disputed that at the time of commission of the offence punishment for the similar offence was provided under section 20(b)(i) of the NDPS Act of 1985 for which punishment which may extend to five years rigorous imprisonment and fine which may extend to rupees fifty thousand was provided. So far permissibility of ex post facto legislation in regard to the escalation of the severity of the punishment is concerned, it is a clear mandate of the Article 20 of the Constitution of India that accused cannot be convicted for greater penalty than that which might have been inflicted under the law enforced at the time of commission of the offence. Hon'ble the Apex Court in **State Vs. Gian Singh**, reported in **1999 Cri LJ 4315** has also observed as under :-

> "It is the fundamental right of every person that he should not be subjected to greater penalty what the law prescribes, and no ex post facto legislation is permissible for escalating the severity of the punishment. But if any subsequent legislation would downgrade the harshness of the sentence for the same offence, it would be a salutary principle for administration of criminal justice to suggest that the said legislative benevolence can be extended to the accused who awaits judicial verdict regarding sentence.

15. Keeping in view the above settled legal position while amending the NDPS Act of 1985 by Amendment Act of 2001 a saving clause by incorporating section 41 was added which provides the benefit of provisions of Amending Act in the cases of pending trial, if such amending provision provides lesser punishment. Therefore, it is abundantly clear that accused could not be sentenced to harsher punishment which was provided at the time of commission of the offence. Therefore, punishment of ten years rigorous imprisonment and fine of Rs.1,00,000/- cannot be sustained which was imposed by the trial court keeping in view the punishment provided under section 20(b)(i) of the Amending Act of 2001 while in this case punishment to the extent of five years rigorous imprisonment and fine to the extent of Rs.50,000/- could have been passed which was provided for the offence under section 20(b)(i) of the NDPS

Act of 1985 at the time of commission of the offence.

16. While making the submissions on the point of quantum of sentence, it was submitted that appellant Pintu was 21 years of age and appellant Vishnu Kant was 24 years of age at the time of commission of the offence, they are not having any criminal antecedents in their credit and they have remained in confinement for a period of about two years and three months, therefore prayer was made for taking lenient view. Reliance was placed on the judgment delivered in **Vajja Srinivasu @ Srinu Vs. State of Andhra Pradesh**, reported in **2001(2) Crimes 47 (SC).**

17. As discussed above, this case pertains to the period prior to the Amending Act of 2001 and at the time of commission of the offence the maximum punishment of five years rigorous imprisonment and fine which may extend to rupees fifty thousand was provided for the offence under section 20(b)(i) of the NDPS Act of 1985. Keeping in view their age at the time of commission of the offence and that the accused appellants have already suffered the sentence for a period of two years, three months and nine days and taking into consideration the view taken in **Vajja @ Srinivasu @**

Srinu's case (supra) wherein Hon'ble the Apex Court while maintaining the sentence of fine of Rs.3,000/- for the offence under section 20(b)(i) of the Act of 1985 reduced substantive sentence from three years imprisonment to one year imprisonment, in my considered view interest of justice would be met if appellants are awarded substantive sentence which they have already suffered with fine of Rs.5,000/- each.

18. Consequently, the appeal is partly allowed. The sentence of imprisonment awarded by the trial court to the appellants is reduced to the period the appellants have suffered and the amount of fine of Rs.50,000/- is reduced to Rs.5,000/- each, in default of payment of fine, the appellants shall suffer one month's simple imprisonment. The impugned judgment and order stands modified as indicated above.

(J.R. Goyal),J.

VS Shekhawat/-
Jr. P.A.